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of title, and in good faith, will hold it by a valid title against all the world. The other proposition that suspicion of a defect of title or a knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer will not defeat his title, is not so well established. But, though it is apt to strike the mind somewhat unfavorably, it is probably good

law. It is *knowledge* of a defect in a title that vitiates it, and mere suspicion is not knowledge nor is gross negligence knowledge of a defect in the title, although it may be evidence of such knowledge: *Murray v. Lardner*, 2 Wall. 110; *Swift v. Tyson*, 16 Pet. 1; *Goodman v. Simonds*, 20 How. 343; *Bank of Pittsburgh v. Neal*, 22 Id. 96.

ADELBERT HAMILTON.

Chicago.

Supreme Court of Ohio.

HERSHISER, ADAMS & CO. v. FLORENCE ET AL.

A married woman having separate estate, who executes a promissory note as surety for her husband, will be presumed, without further proof, to intend thereby to charge her separate estate. Such presumption can only be overcome by proof of facts or circumstances surrounding the execution and delivery of the note, which show that such was not her intention.

Real estate purchased by a married woman with her individual means, becoming her general property, was, by a subsequent statute, changed into her separate estate subject to vested rights. Such property was not thereby subjected to her debts previously made, and the husband's freehold, *jura uxoris*, was not divested. Subject, however, to vested rights, and with reference to her future contracts, such property is to be regarded as separate property.

ERROR to the District Court of Madison county.

The action was brought to charge the separate estate of a wife with the payment of two promissory notes for \$200 and \$400, executed by husband and wife, the wife having a separate estate at the time.

The facts, as agreed upon, were that prior to 1833, John Williams died intestate, possessed of 1804 acres of land, leaving four children, John Williams, Jr., Harrison Williams, Washington Williams and defendant, Elizabeth Florence, then Elizabeth Williams, his only children and heirs, to whom descended this land as tenants in common in fee simple. Elizabeth Williams married Robinson Florence in 1833, and they have ever since that time resided together as husband and wife. About 1840, Robinson Florence purchased Harrison Williams's undivided one-fourth of said land. About 1845 he purchased John Williams, Jr.'s, undivided one-fourth. About 1840, the undivided one-fourth of Washington Williams

was set off, assigned and conveyed to him in severalty by his cotenants. Between 1856 and March 22d 1860, Edward Edwards contracted with Robinson Florence for furnishing materials and building a house on the remaining three-fourths of said land which was then owned by Robinson Florence and his wife, Elizabeth Florence, as tenants in common, the husband owning two undivided fourth parts, and his wife owning one undivided fourth part. Edwards constructed the house between 1856 and March 22d 1860, in pursuance to the plans and according to the directions of the husband, Robinson Florence. About March 22d 1860, Robinson Florence became financially embarrassed, and was compelled to dispose of his interest in said lands, and on that date, by agreement, partition was made of the undivided *three-fourths* (the husband's interest), by which one-fourth was assigned to the wife in consideration of her release of her inchoate right of dower in the other two-fourths, which two-fourths were sold free from such right of dower to pay the debts of said Robinson Florence. The house built by Edwards was on the land assigned to the wife. In 1861 or 1862, Robinson Florence was insolvent, and was indebted to Edwards in the sum of \$600 in the construction of the house. In 1867 Edwards claimed \$800 as due him from the husband, but offered to take \$600 in full satisfaction if Robinson Florence, who was still insolvent, would give him his notes payable to R. B. Adams & Co., or order, to whom said Edwards was indebted; one for \$200 due in one year from date, with interest, and the other for \$400 due in two years from that date without interest, with his wife, the said Elizabeth, as surety thereon. This offer was accepted, and the notes in suit executed and delivered accordingly. Elizabeth Florence knowingly signed said notes as surety for said Robinson. Said notes were subsequently assigned by said R. B. Adams & Co., for value, to the plaintiffs.

The District Court, on this statement of facts, rendered judgments in favor of the wife, Elizabeth Florence, and this proceeding was prosecuted to obtain a reversal of this judgment.

DOYLE, J.—If the defendant, Elizabeth Florence, was, at the date of the execution of the notes, the owner of the real estate described in the petition, or any part of it, as her separate property, the judgment of the District Court is wrong.

When a married woman, owning a separate estate, executes a

promissory note, either for herself or as surety for her husband, the presumption is that she charges her separate property with the payment thereof. Such presumption *cannot* be overcome by testimony by the wife that such was not her intention. Unless there are circumstances surrounding the transaction which show that such was not her intention, it is not material what her secret purpose was, and the presumption aforesaid will prevail.

The finding, therefore, by the District Court, that she knowingly signed the notes as surety for her husband, is sufficient to bind her separate property (if she has any), notwithstanding the denial in her answer that by the execution of the notes she made such charge, or the averment that she did not by word or deed, promise to pay said notes out of her separate estate, or pledge the same for such purpose: *Avery v. Van Sickle*, 35 Ohio St. 270; *Williams v. Urmston*, Id. 296.

The next question is, was Mrs. Florence possessed of a separate estate at the date of the execution of the notes in 1867? We are relieved from considering the question whether or not the estate which the wife now owns, having come to her prior to 1833, shall be governed by the common law, by the fact that the husband and wife in 1860 united in conveying this land to a trustee, who afterwards conveyed the same to the wife. Whatever interest the husband had, passed by his deed to the trustee, and when the title became again vested in the wife, his rights accrued under the law as it then stood. The rule asserted in *Tabler v. Wiseman*, 2 Ohio St. 207, and *McBain v. McBain*, 15 Id. 337, that no new title is created in statutory partition proceedings, does not apply to the deliberate conveyances of the parties, especially where there is an independent consideration for such conveyances. In the present case, the wife, in consideration of the conveyance to her of the land in question, which was improved by the house in the erection of which this debt was incurred, released her inchoate right of dower in the remainder of the land. The rights of the parties are, therefore, to be determined under the law as it stood in 1860, and such modifications thereof as the legislature has since, within the constitutional powers, made by statute.

By the common law, the husband, upon marriage, became vested with the wife's estate of inheritance during coverture, and if he survived her, and issue capable of inheriting it had been born to them, he had a life estate by the curtesy. This interest of the

husband's could be taken for his debts, and he could convey or incumber it, hence the wife was not secure of a home in her own lands during the life of her husband. To mitigate this, the Act of February 28th 1846 was passed, which provided that such husband's interest shall not be liable for his debts, nor could he convey or incumber except by joint deed during the life of the wife, or the life or lives of the heir or heirs of her body: *Jenney v. Gray*, 5 Ohio St. 45. This act was in force in 1860, when the wife's present title accrued.

The Act of February 11th 1824, regulating descent and distribution of estates, contained a provision that it should not apply to tenancy by the curtesy, hence it was left as it existed at common law. The Act of 1835 amending the Act of 1824, provided that the act should not affect tenants by the curtesy "in any estate of inheritance of any deceased persons." This act was again amended in 1853, which added the provision that "surviving husbands, whether there has been issue born during the coverture or not, shall be entitled to the estates of their deceased wives by the curtesy." This was construed not to vest an estate like unto curtesy initiate, but operated only to enlarge the rights of a surviving husband, and that the right of the possession and control of the real estate of his wife was unaffected by the act: *Denny v. McCabe*, 35 Ohio St. 576; *Bank v. Stauffer*, 10 Penn. St. 398; 1 L. Ca. in Am. Law of Real Prop. 259; *Monroe v. Van Meter*, 100 Ill. 347. This legislation preserved to the husband during coverture the possession and the rents and profits of his wife's land and curtesy consummate without power to convey or incumber the interest or to be charged with his debts. We think no estate by the curtesy vested in the husband in this case in 1860 when the title of the wife was received. In 1861, an act was passed providing that any estate or interest, legal or equitable, in real estate belonging to a woman at her marriage, or which comes to her during coverture by conveyance, gift, devise or inheritance, or by purchase with her separate money or means, shall, together with all rents and issues thereof, be and remain her separate property and under her sole control, * * * but the estate by curtesy, after the wife's decease, is not affected, nor is his estate subject to his debts, nor can he convey or incumber it but by her joining in the deed, nor does the act affect any vested rights. This act deprived the husband of the possession and the rents and

profits during coverture, but saved him curtesy after his wife's death. It turned the general property of the wife into her separate estate; not in all respects like the separate estate which existed in equity, but a statutory separate estate, which did not, and could not, affect vested rights. Hence, it was decided that before the Act of 1861, her note was not a charge on her property, because such property was not her separate estate: *Logan v. Thrift*, 20 Ohio St. 62; *Fallis v. Keys*, 35 Id. 265. The legislature has power to enlarge the power and control of the wife over her own property so as to affect her subsequent conduct, but not to interfere with vested rights. The Act of 1861 converted the general property of the wife into separate property, without affecting vested rights, and does not take away or impair any right of the wife, nor without her consent create any new obligation. With respect to past transactions, it does not attach any disability or liability. With respect to her future acts, this act and the amendment of March 23d 1866 enables her to charge such property as her separate property. The rights of the husband, which vested in him prior to the Act of 1861, are not affected. He is still entitled *jure uxoris* to the possession and rents and profits during the joint lives of himself and wife. That is the only right preserved by the acts prior to the Act of 1861. If he survive her, he will be entitled to estate by curtesy.

Therefore, subject to the marital rights of the husband, she can charge this estate as her separate property, by contracts or obligations entered into by her subsequent to the passage of the Act of 1861 creating the separate estate. Hence, in this case, the rents and profits of the land in question cannot be subjected to the payment of the notes sued on. They belong to the husband during the joint lives of himself and wife. Subject thereto, however, the notes are a charge upon the wife's estate, which can be sold, if necessary to pay them.

In several cases expressions have been used in conflict with this view. In *Clark v. Clark*, 20 Ohio St. 128, it was held that a married woman could not maintain ejectment for land acquired before 1861, having no words creating by deed separate estate, because the husband is entitled to possession during their joint lives. That opinion is also inaccurate in stating that the husband has an inchoate estate of curtesy with the present right of possession; because there is no curtesy before the birth of issue. The hus-

band becomes seised of a freehold by the marriage, but it is his wife's freehold, not his. In contemplation of law, her person is his person, and her seisin his seisin. After issue born, he has a separate estate: *Lancaster Co. Bank v. Stauffer*, 10 Penn. St. 398; *Huthon v. Lyon*, 2 Mich. 94; *Tong v. Marvin*, 15 Id. 60; *Thurber v. Townsend*, 22 N. Y. 517; *Billings v. Boker*, 28 Barb. 343; 9 Ind. 187, 371.

In *Clark v. Clark*, *supra*, it is said "lands conveyed to a married woman prior to the Act of April 3d 1861, do not, by virtue of that act, become the separate property of the wife." The only question, however, before the court was whether the Act of 1861 divested the husband of his marital right to the possession, so as to enable the wife in her own name to maintain an action of ejectment, and the quoted proposition must be read in that light. The Act of 1861 certainly did not convert his right of possession into the separate property of the wife, because it was a vested right, and the act could not and did not purport to have that effect.

An expression in the opinion in *Fallis v. Keys* seems to imply that the act operated on future acquired estates only. But the property of the wife in that case was undoubtedly her separate property admitted to have been acquired after 1861, and the question being whether it could be charged with an obligation entered into prior to 1861, this question was not before the court, and it did not attempt to decide it.

Judgment reversed.

JOHNSON, C. J.—I dissent from the first point in the syllabus for the reason stated in *Levi v. Earl*, 30 Ohio St. 147. I concur in the judgment upon the facts stated in the record, but differ as to the effect of the Act of 1846. It is stated that that act limited the freehold estate of the husband *jure uxoris*, exempting it from liability for his debts, or being sold or encumbered by him and therefore the estate was a freehold *vested in him alone* during coverture which entitles him to sole possession with the exclusive right to the rents, issues, and profits of the land. The Act of 1846 goes farther. Its sole object was to protect a married woman and the heirs of her body in the enjoyment of the possession, rents, issues, and profits of her general estate acquired after the Act of 1846, *in common with her husband* during coverture, and during

the life of heirs of her body. This was done by taking from him all the common-law incidents of a sole freehold estate *jure uxoris*. It is not liable for his debts, nor could he sell or encumber it, without she consented by joining in a valid conveyance.

It was solely for her benefit and that of the heirs of her body during their lives.

As to lands acquired by a married woman after the Act of 1846, her husband acquired an estate of freehold in common with his wife the owner of the fee, and she, jointly with him, is entitled to the possession, rents, issues, and profits, and it follows that this interest of the wife during coverture, became the separate property of the wife by virtue of the Acts of 1861 and 1866. Hence I concur in the judgment but think that this joint interest of the wife in common with her husband is under the Acts of 1861 and 1866 chargeable.

This is an important case in view of the construction of a peculiar enabling statute, and, in view of the division of those married women statutes into three distinct classes, namely, those statutes which make the wife the owner, at law, of the property she had before, and that acquired during marriage, instead of letting it pass to the husband by the rules of the common law—statutes which merely exempt the property from her husband's debts, contracts or obligations, and statutes which not only make her the owner at law of the property, but expressly empower her to contract and be contracted with at law as a feme sole.

The points decided by this case are, first, that, during the existence of the common law, property which came to the wife by conveyance, gift, devise or inheritance, etc., without words of separate estate, became her general property, and all rights vesting, such as curtesy, during the continuance of such estate, were not impaired when such property was changed into her separate estate. Second, that a statute providing that the property belonging to a woman at the time of her marriage and that which comes to her during coverture, by conveyance, gift,

devise or inheritance, or by purchase with her separate money or means, together with all the rents and issues thereof, shall be and remain her separate property and under her sole control; converted the general property into separate estate. Third, that such separate estate is liable for the payment of a promissory note which she signed as surety for her husband; because the signing is proof of the intention to charge the estate. This intention can be rebutted by proof of facts or circumstances which show that she did not intend to charge her estate, but the wife's evidence or testimony of her secret purpose is not such proof.

It is interesting to observe the various doctrines adopted upon this subject and the origin and growth of this doctrine of intention, to which the above decision adheres, as well as the different methods adopted in the construction of these enabling statutes.

The Ohio court affords an apt illustration. In *Phillips v. Graves*, 20 O. St. 371, the court held that the separate estate was liable for the purchase-money for a piano (evidenced by a writing), which she purchased for her own use and

benefit, because it was her intention to charge her separate estate understood by all the parties, the court holding that such estate was liable *only* when the wife *intends* expressly or impliedly to charge it; that her intention is expressed when such language is used in the contract implied when for the benefit of the estate, or her own benefit on the credit of the estate; hence, in this case, the piano was for her own benefit on the credit of the estate, and, therefore, her intention to charge arose from her contract. In *Levi v. Earl*, 30 O. St. 147, the court decided that the separate estate *was not liable* for a note wherein the wife was endorser as surety for her husband; because there was no intention to charge. There was no intention expressed, and as the intention can be implied *only* when the contract is for the benefit of the estate or for her own benefit on the credit of the estate and her contract of surety was not either of these, her intention to charge did not arise from her accommodation endorsement.

In *Rice v. Railroad*, 32 O. St. 380, it was held that the separate estate *was not* liable for her subscription to pay money, because there was no intention to charge expressed in the subscription, and such intention could not be implied from the mere fact of subscribing to pay. The case of *Williams v. Urmston*, 35 O. St. 296, decided that the separate estate *was liable* for a note executed by her as surety for her husband, *because* her intention to charge was implied from the mere execution of the note. In *Avery v. Van Sickle*, 35 O. St. 270, the court held that all of the separate estate *was liable* for her note given for the purchase-money of real estate, although such note was secured by mortgage on the property purchased and exhausted by other liens. The case of *Harris v. Wilson*, decided by the Supreme Court Commission, Dec. 1883, follows *Williams v. Urmston* and *Adams & Co. v. Florence*. The cases of *Levi v. Earl* and *Rice v. The Railroad*, follow

Phillips v. Graves in this that, in the latter case, the intention is implied, because the contract was made on her own account upon the credit of the estate and she received the benefit. In the former cases (*Levi v. Earl* and *Rice v. Railroad*) the intention was not implied, because she or her estate received no benefit, the court stating that her intention to charge could not be implied from her endorsement in one case and her subscription in the other. *Williams v. Urmston*, followed by *Avery v. Van Sickle*, *Adams & Co. v. Florence* and *Harris v. Wilson*, held that the intention to charge is implied from the execution of the note. *Phillips v. Graves*, followed by *Levi v. Earl* and *Rice v. Railroad*, holds that the intention is implied *only* when the consideration is for the benefit of the estate, or her own benefit upon the credit of the estate.

The doctrine in *Williams v. Urmston* is the English doctrine, which has nothing at all to do with the doctrine of intention, and the rule in *Phillips v. Graves* is the American doctrine of intention.

It is universally conceded that the common law prevails, except in so far as these statutes expressly, or by necessary implication, change it, or except in so far as removed by the statutes (*Brookings v. White*, 49 Me. 479; *Edwards v. Stevens*, 3 Allen 315; *Perkins v. Perkins*, 62 Barb. 531; *Mallett v. Parham*, 52 Miss. 922; *Mahon v. Gormley*, 24 Penn. St. 82; *Alverson v. Jones*, 10 Cal. 9; *Farrell v. Patterson*, 43 Ill. 52; *Stanton v. Kirsch*, 6 Wis. 338; *Smith v. Hewett*, 13 Iowa 94; *Johnson v. Runyan*, 21 Ind. 115); just in regard as to the separate estate in equity, the common law prevailed, except in so far as the trust gave to equity jurisdiction to change it; although it has been held that this is not the proper construction, but that the construction should be adopted which would best effectuate the intention of the legislature and the purpose of the act: *Power v.*

v. *Lester*, 17 How. Pr. 413; *Goss v. Cahill*, 42 Barb. 310; *Bergey's Appeal*, 10 P. F. Smith 408; *Ratcliffe v. Dougherty*, 24 Miss. 181; *Huff v. Wright*, 39 Ga. 43; *Stone v. Gazzam*, 46 Ala. 275. Hence these statutes do not, unless they so provide, interfere with nor operate upon the relations, duties and responsibilities existing between husband and wife (*Walker v. Reamy*, 12 Casey 410; *Schindel v. Schindel*, 12 Md. 108; *Cole v. Van Riper*, 44 Ill. 58; *Duning v. Pike*, 46 Me. 461); nor do they take from the husband his marital rights, except as they pertain to her property; nor relieve him from responsibility, except as they relate to the wife's contracts and debts binding upon her separate estate: *Pippen v. Wesson*, 74 N. C. 442; *Davis v. Bank*, 5 Neb. 247; *Pond v. Carpenter*, 12 Minn. 432; *Conway v. Smith*, 13 Wis. 131; *Snyder v. The People*, 26 Mich. 108; *Mitchell v. Otey*, 23 Miss. 239.

Under the third class of statutes, namely, those which provide that a married woman may contract, sue and be sued as a feme sole, she is empowered with the capacity of a person *sui juris*; but under the class which merely exempts her property from liability for his debts, she has no power of contract or separate estate: *Willard v. Eastham*, 15 Gray 328; *Durfee v. McClurg*, 6 Mich. 223; *Duren v. Getchell*, 55 Me. 241; *Cookson v. Toole*, 59 Ill. 515; *Albin v. Lord*, 39 N. H. 196; *Batchelder v. Sargent*, 47 N. H. 262; *Beard v. Dedolph*, 29 Wis. 136; *Devries v. Conklin*, 22 Mich. 255. The other statutes give to the wife a separate estate at law, instead of letting it pass to the husband under the rules of the common law; but such property vests in the wife as a wife, and not as a person *sui juris* (*Johnson v. Cummins*, 1 C. E. Green 97; *Leonard v. Rogan*, 20 Wis. 540; *Barton v. Beer*, 35 Barb. 78; *Bradford v. Greenway*, 17 Ala. 797), and do not invest her

with the general power of contract (*Jones v. Crosthwaite*, 17 Iowa 393; *McKee v. Reynolds*, 26 Id. 578; *Tracey v. Keith*, 11 Allen 214; *Hovey v. Smith*, 22 Mich. 170); nor enable her to bind her person, nor enter into personal contracts; but she can charge this legal, separate estate, created by statute, to the same extent and for the same purposes that she could have charged her equitable separate estate (*Todd v. Lee*, 15 Wis. 365; *Yale v. Dederer*, 18 N. Y. 265; *Ballin v. Dillaye*, 37 Id. 35; *Albin v. Lord*, 39 N. H. 196); because the statute does not interfere with the equity jurisdiction or power to charge (*Johnson v. Cummins*, 1 C. E. Green 97; *Cookson v. Toole*, 59 Ill. 515); nor change the status of marriage (except to deprive the husband of his property interest), nor change the common-law disability to contract, except as the statute so empowers: *Cole v. Van Riper*, 44 Ill. 58; *Duning v. Pike*, 46 Me. 461; *Peake v. LaBaw*, 6 C. E. Green 269; *Schindel v. Schindel*, 12 Md. 108.

It has been held that as these statutes confer the right to hold and enjoy the separate estate, it follows that any act or contract which enables the wife to use, hold and enjoy such separate estate will bind such estate *at law*, because such contracts are incident to the right conferred (*Armstrong v. Stovall*, 26 Miss. 280; *Maclay v. Love*, 25 Cal. 381; *Carpenter v. Mitchell*, 50 Ill. 473; *Wilkinson v. Cheatham*, 45 Ala. 341; *West v. Laraway*, 28 Mich. 465; *Todd v. Lee*, 15 Wis. 365; *Johnson v. Cummins*, 1 C. E. Green 97; *Peake v. LaBaw*, 6 Id. 269; *Albin v. Lord*, 39 N. H. 196; *Cookson v. Toole*, 59 Ill. 515); and the grant of a thing or power carries with it every power necessary to make the grant effective. But as these statutes merely create a legal separate estate, without conferring the power to contract or disturbing the equity doctrine to charge, she can only make contracts binding in

equity and not at law, because the power to charge comes by implication from the equity doctrine, and the power to contract cannot be derived by implication, but must be expressly conferred: *Devries v. Conklin*, 22 Mich. 255; *Mitchell v. Smith*, 32 Iowa 484; *King v. Mettalberger*, 50 Mo. 182; *Colby v. Lamson*, 39 Me. 119; *Leonard v. Rogan*, 20 Wis. 540; *Faucett v. Currier*, 109 Mass. 79; *Ames v. Foster*, 42 N. H. 381; *Richmond v. Tibbles*, 26 Iowa 474. Hence, it follows, that a married woman can bind her statutory separate estate by the same contracts and to the same extent that the equitable separate estate could have been charged, and can make no other or further contract, and has no other or further power unless the statute expressly confers it. This being correct, it follows that in those states where the English principle is followed *the rule is*, that unless restrained by the statute, a married woman has full capacity to contract with respect to her separate estate so as to make that estate the debtor; and in those states where the American principle is adopted *the rule is*, that unless the statute, expressly or by necessary implication, confers the power to contract, she has no capacity to contract except such as is necessary to hold and enjoy such separate estate. The one rule is the opposite of the other. Under the former rule she can contract with respect to her separate estate so as to make such estate the debtor, under the latter rule, she cannot contract except in so far as the statute, expressly or by necessary implication, enables her to do it. Under both rules she can make contracts to enable her to hold and enjoy the estate, such as for needed improvements or repairs—contracts beneficial to the estate: *Kelly on Contracts of Married Women* 269, and cases cited.

Following the English rule, a married woman's contracts are express or implied charges on her separate estate;

express, when she expressly charges the estate: such as a specific charge, mortgage or lien, or by express words makes the contract a charge upon it; implied, when she does not expressly charge the estate, but the facts show that she contracted so as to make the estate the debtor, such as her note or written obligation, and such as inured to the benefit of the estate. From this came the doctrine of *intention*. When she expressly charged the estate there existed an expressed intention. When she executed a note or written obligation, or the contract inured to the benefit of the estate, the courts held that her intention was implied.

In Alabama, Arkansas, Connecticut, Iowa, Kansas, Illinois, Kentucky, Maryland, Missouri, Ohio, Wisconsin and some others, the courts adopt and follow the doctrine of express and implied intention: *Cowles v. Pollard*, 51 Ala. 445; *Short v. Battle*, 52 Id. 456; *Palmer v. Rankins*, 30 Ark. 771; *Platt v. Hawkins*, 43 Conn. 143; *McCormick v. Holbrook*, 22 Iowa 487; *Knaggs v. Mastin*, 9 Kans. 547; *Furness v. McGovern*, 78 Ill. 338; *Williamson v. Williamson*, 18 B. Mon. 385; *Hall v. Eccleston*, 37 Md. 510; *Whiteley v. Stewart*, 63 Mo. 363; *Williams v. Urmston*, 35 O. St. 296; *Todd v. Lee*, 15 Wis. 380; *Radford v. Carwile*, 13 W. Va. 572; *Morrison v. Solomon*, 52 Ga. 206. In California the courts seem to hold that the contract must be a specific charge, or in the nature of a specific charge: *Maclay v. Love*, 25 Cal. 382. See *Pond v. Carpenter*, 12 Minn. 430. In Indiana the intention to bind or charge the separate estate must be expressly declared, and will not be inferred: *Shannon v. Bartholomew*, 53 Ind. 54; *Hodson v. Davis*, 43 Id. 258. In New York it was held that the intention to charge must be declared in the contract itself, or the consideration of the contract must be for the direct benefit of the estate: *Yale v. Dederer*, 22 N. Y. 450; *Manhattan*

Co. v. Thompson, 58 Id. 84; *Woolsey v. Brown*, 11 Hun 52. Subsequently this was extended to contracts made on the credit of the estate for its use and benefit: *Bank v. Miller*, 63 N. Y. 639; *Conlin v. Cantrell*, 64 Id. 217. This is the same as holding that the estate is liable when the contract is made with respect to the separate estate, so as to make such estate the debtor; because she can only do this when she expressly makes it the debtor, and when she contracts on the credit or for the benefit of such estate.

The rule in New York is followed in Massachusetts, Maine and New Jersey: *Burr v. Swan*, 118 Mass. 588; *Verrill v. Parker*, 65 Me. 578; *Perkins v. Elliott*, 7 C. E. Green 127; *Pentz v. Simonson*, 2 Beas. 232. In Pennsylvania the American rule prevails that a married woman can only make the contracts allowed by the statute: *Shonk v. Brown*, 11 P. F. Smith 320; *Pa. Co. v. Foster*, 11 Casey 134; *Haines v. Ellis*, 12 Harris 253.

As the power to bind the statutory separate estate comes from the equitable doctrine to charge the equitable separate estate in which is involved the doctrine of intention, it is necessary to understand this doctrine.

A separate estate for married women created by trust was recognised in courts of equity for the purpose of excluding the common-law marital rights of the husband and securing to the wife an independent estate and income, free from the control and interference of the husband. See *Murray v. Barlee*, 3 M. & K. 219; *Owens v. Dickinson*, Cr. & Ph. 48. And in the beginning the doctrine was established that, with respect to this separate estate, she is free from the common-law disability of coverture, and invested with the rights and powers of a person *sui juris*; not unlimited or unqualified, but with respect to her separate estate (*Norton v. Turville*, 2 P. Wms. 144; *Dowling v. Maguire*, Plunk.

19; *Clinton v. Willis*, 1 Sugd. Pow. 208; *Kenge v. Delevall*, 1 Vern. 326). Because to every estate or interest in property held by a person *sui juris*, the common law attached the right of alienation—the *jus disponendi*—unless restrained by the investment creating it, equity admitted this right, and it followed that as she was *sui juris* in equity with respect to this estate, she had the full power of disposition—the *jus disponendi*. Lord THURLOW, in *Pyhus v. Smith*, 3 Bro. C. C. 347, introduced the provision against alienation—restraint of the *jus disponendi*—then it was ruled that if not restrained she was, in equity, a feme sole as to her separate estate. This was limited to her capacity to enjoy and dispose of the estate (*Grigby v. Cox*, 1 Ves. 517; *Allen v. Papworth*, Id. 163; *Peacock v. Monk*, 2 Id. 190), and it was conceded that she could charge the estate by a specific charge, such as a mortgage or an instrument in execution of the power of appointment, this being an exercise of the *jus disponendi*. This was followed by the ruling in *Hulme v. Tenant*, 1 Bro. C. C. 20, that a married woman not only had the *jus disponendi*, as when she contracted that this or that portion of the estate should be disposed of in this or that way, but also that such estate was liable for her contracts and debts; but the point decided was, that a separate estate without restraint of the *jus disponendi* was liable for her bond, hence the decision added to the rule the liability for her bond, and a *dictum* that it was liable for her debts: *Bolton v. Williams*, 2 Ves. Jr. 150; *Greatley v. Noble*, 3 Mad. 94; *Stuart v. Kirkwall*, 3 Id. 387; *Angell v. Hadden*, 2 Mer. 164. This case referred to *Allen v. Papworth*, 1 Ves. Sr. 163, and *Grigby v. Cox*, Id. 517, to support the ruling; but these cases do not support it, but held the estate liable *only* when she specifically pledges it and expressly acts with respect to it. *Hulme v. Tenant*

had a *quasi* precedent in *Norton v. Turville* and *Stanford v. Marshall*, but the facts were not the same. The doctrine of *Hulme v. Tenant* was shortly thereafter questioned and doubted (*Nantes v. Carrock*, 9 Ves. 188; *Jones v. Harris*, Id. 497; *Sperling v. Rochford*, 8 Id. 175; *Parkes v. White*, 11 Id. 221; *Whistler v. Newman*, 4 Id. 129), and disapproved on principle (*Bolton v. Williams*, 2 Ves. Jr. 138; *Jones v. Harris*, 9 Ves. 486; *Aguilar v. Aguilar*, 5 Mad. 414, and some others), for the reason that the proposition, "that with respect to her separate estate a married woman is a feme sole," means that she is a feme sole only *quoad* the capacity to enjoy and dispose of the estate, and not that she has the full power to contract. The possession of the estate did not *per se*, confer the power to contract, but by receiving it, she also received the power to enjoy it and dispose of it; and *a priori*, the power to contract concerning it. To hold that the estate is liable for a bond or other like obligation, which does not refer or relate to the separate estate, nor the exercise of the *jus disponendi*, but which is merely a personal contract, as is held in *Hulme v. Tenant*, is to give effect to a void contract, and charge a personal contract to pay money only, into a contract to be paid out of a particular estate, constituting it an exercise of the *jus disponendi*. See the opinions in *Jones v. Harris*; *Greahley v. Noble*; *Stuart v. Kirknall*; *Sackett v. Wray*, *supra*.

At this period there existed these two doctrines: one, that the estate was liable for all her debts, at least her bonds, because she was the owner (in equity), and this liability is incident to ownership; the other, that it was not so liable, but was liable for a specific charge—an appointment or a disposition—because she has not the general power to contract, but could deal with and concerning the estate.

The rule announced in *Hulme v.*

Tenant, that the separate estate was liable for the wife's bond, was extended to her note (*Bullpin v. Clarke*, 17 Ves. 365; *Field v. Sowle*, 4 Russ. 112; *Tullett v. Armstrong*, 4 Beav. 323), and bill of exchange (*Stuart v. Kirkwall*, 3 Mad. 387; *Coppin v. Gray*, 1 Y. & C. Ch. 205; *McHenry v. Davies*, L. R., 10 Eq. 88), and subsequently to any writing (*Master v. Fuller*, 1 Ves. Jr. 513; *Vaughn v. Vanderstegen*, 2 Drew. 180; *Murray v. Barlee*, 4 Sim. 82), not on the ground advanced in *Hulme v. Tenant*, but on the ground that such obligations were equitable appointments or an exercise of the *jus disponendi*; because such obligation was given to be effective, and as it could only be effective against the separate estate, not her person, she therefore intended that the estate should be liable: *Shattock v. Shattock*, L. R., 2 Eq. 182; *Matthewman's Case*, L. R., 3 Eq. 787.

One class of decisions asserted the liability existed, because such contracts were debts and incident to ownership: *Partericle v. Powlet*, 2 Atk. 383; *Allen v. Papworth*, 1 Ves. Sr. 163; *Hulme v. Tenant*, 1 Bro. C. C. 16. Another class, because such obligations were in the nature of an appointment or incident to the power to dispose: *Bolton v. Williams*, 2 Ves. Jr. 142; *Whistler v. Newman*, 4 Ves. 145; *Shattock v. Shattock*, L. R., 2 Eq. 182; *Harris v. Mott*, 14 Beav. 169. Both held them binding. The latter class stepped from Lord ELDON's opinions but endeavored to place such liability on his reasonings, namely, that she *intended* the writing as an appointment or disposition. Subsequently the cases repudiated this ground and held that the liability existed because they are debts; "having the property in equity, she has the power of contracting debts to be paid out of it:" *Owens v. Dickenson*, Cr. & Ph. 53; *Hughes v. Turner*, 3 M. & K. 690; *Murray v. Barlee*, 3 Id. 209. And established the doctrine of intention

(*Johnson v. Gallagher*, 3 De G., F. & J. 515; *Leeds' Banking Co.'s Case*, L. R., 3 Eq. 787; *Chubb v. Stretch*, L. R., 9 Eq. 555), and that there was no distinction between her contracts or debts evidenced by a writing, and her contracts and debts evidenced by parol. The verbal contract is binding when the intention is expressed and the written contract because the intention is implied: *Owens v. Dickenson*, *Murray v. Burlee*, *Mathewman's Case*, L. R., 3 Eq. 787; *Johnson v. Gallagher*, *Picard v. Hine*, L. R., 5 Eq. 274. This distinction is only one of form. The inference that she intended to charge her separate estate should be drawn from the contract, not from the form or evidence of the contract. However, whether the liability is placed on the doctrine of intention, the *jus disponendi*, an equitable appointment, or an incident of ownership, the weight of authority holds such estate liable for her instrument in writing.

This doctrine of intention has been applied to what is spoken of as her general engagements, such as goods bought or sold, or renting a house, or contracts in the ordinary course of domestic life. On this subject a good review was made in *Johnson v. Gallagher*, *supra*, where Lord Justice TURNER stated that the result of the cases is that to bind the separate estate by a general engagement it should appear that the engagement was made with reference to and upon the faith and credit of that estate, and whether it was so or not is a question to be determined upon all the circumstances of the case. KINDERSLEY, V. C., in *Mathewman's Case*, *supra*, adopted this principle and stated that "if the wife contracted not for her husband but for herself, with respect to her separate estate, that estate will be liable." Whether this was done is a fact to be proved. The rule was followed and considered settled in *The Bank of Australia v. Lempriere*, L. R., 4 P. C. Ap. 591, that

as to general engagements to bind the separate estate they must be made with reference to and upon the faith and credit of the estate.

From the English cases the conclusion is that her bonds, bills, notes and contracts in writing are binding on the estate, but the reason therefor is not settled. All contracts, parol or written, are binding when she expressly stipulates that the estate shall be charged. All other contracts, debts or engagements are binding when she intended to contract so as to make her estate the debtor. Such intention will be presumed when she lives separate and apart from her husband. This is nothing more than the doctrine of intention. Now such written and verbal obligations are binding, either because she is, in equity, a feme sole, with a general power to contract, but with the remedy against the estate; or because of her intention to charge the estate. The former can not be the reason, because the possession of separate estate does not and can not *per se* release her from her general disability at law and confer upon her a general power of contract, and because if this is the ground, all her contracts, including her general engagements, would be binding as if made by a person *sui juris*, which would be contrary to the cases since *Johnson v. Gallagher*. The latter can not be the reason, because there is not, in the absence of acts or words, any principle for drawing a constructive intention to charge, nor any principle for holding that the intention to charge is implied from her written and not implied from her verbal contracts. A better rule would be that a married woman having a separate estate is not a feme sole in every respect, with the general power of contract, but is a feme sole with respect to her separate estate, namely, a feme sole to enjoy and dispose and a feme sole to make obligations and incur debts with respect to it so as to make the estate the debtor. This can be

done when her contract expressly stipulates that such is the case, or when she refers to the estate, or when the contract is mutually made on the faith and credit of the estate, or when it is for the benefit of the estate. In all cases the question should be was the contract made so as to make the separate estate the debtor.

The lead in repudiating the English doctrine was taken in 1811 by the South Carolina Court in *Ewing v. Smith*, 3 Des. 417, holding that a married woman has no power over her separate estate and no capacity to contract but such as is given in the instrument which creates it; and that unless the instrument creating the estate (deed of trust or statute) expressly provides that the estate shall be liable for her debts and contracts, or in the absence of this, that the obligation was incurred to effectuate the object and purpose of the trust, the estate is not liable for her contracts, written or unwritten, and as her person is not liable, such obligations are null and void. This was doubted in *Trustees v. Center & Hall*, 1 McCord Ch. 270, in 1826, but affirmed in *Magwood & Patterson v. Johnston et al.*, 1 Hill Ch. 228, in 1833, and has since been followed. In 1817 Chancellor KENT, in *Methodist Episcopal Church v. Jacques*, 3 Johns. Ch. 78, stated that the English cases were so floating and contradictory as to leave him free to adopt the true principle and hold that instead of maintaining, as is the English rule, that a married woman has the full power to contract, unless restrained by the instrument creating the estate, the converse would be more correct that she has no power but what is specially given and to be exercised only in the mode prescribed, and if no mode prescribed it is intended to leave it at large to the discretion or necessities of the wife. This ruling was reversed by the Court of Errors (17 Johns. 548) and the English rule substantially adopted, holding "that

unless restrained by the instrument creating the separate estate a married woman is, with respect to that estate, a feme sole in equity, and may dispose of such estate without the consent or concurrence of her trustee, and charge it by her agreement when she indicates her intention to effect it," Chief Justice SPENCER stating "that when a feme covert having separate estate, enters into an agreement and sufficiently indicates her intention to effect it, her separate estate is liable if no fraud or unfair advantage." Subsequently it was held that not only must the married woman sufficiently indicate her intention but that intention must be declared in the contract, or the consideration must be for and going to the direct benefit of the separate estate, (*Yale v. Dederer*, 22 N. Y. 451; 18 Id. 265; 21 Barb. 286; 68 N. Y. 329), although the exact question in *Yale v. Dederer* was whether a married woman, having a separate equitable estate, could create a charge on that estate by giving a promissory note for the debt of her husband, without indicating in the note her intention to charge, and the court decided that she could not. This case was followed (*White v. McNett*, 33 N. Y. 371; *Owen v. Cowley*, 36 Id. 600; *Ballin v. Dillaye*, 37 Id. 35; *Fowler v. Seaman*, 40 Id. 592; *Ins. Co. v. Babcock*, 42 Id. 613; *Bank v. Scott*, 59 Barb. 641); then her intention verbally expressed was allowed (*Maxon v. Scott*, 55 N. Y. 247; *Weir v. Groat*, 4 Hun 193; *Bank v. Miller*, 63 N. Y. 639; *Rohrbach v. Ins. Co.*, 62 N. Y. 47), then the court regretted that the doctrine was so settled (*M. B. & M. Co. v. Thompson*, 58 N. Y. 80), and in one case the intention was allowed to be inferred from circumstances: *Conlin v. Cantrell*, 64 N. Y. 217. The rule in this state could be placed upon the English doctrine if the intent is allowed to be inferred from the execution of the note; but since *Yale v. Dederer* the doctrine rest on her expressed intent, written or

verbal, not implied; hence, if the contract is made so as to make the estate the debtor, it will bind the estate.

The American doctrine, as first advanced in South Carolina and expounded by Chancellor KENT, has been adopted and followed in Pennsylvania (*Thomas v. Folwell*, 2 Whart. 11; *Lancaster v. Dolan*, 1 Rawle 231; Kelly's Cont. M. W. 258, cases cited), Tennessee (*Ware v. Sharp*, 1 Swan 489; *Morgan v. Elam*, 4 Yerg. 375; *Kirkby v. Miller*, 4 Coldw. 4; *Litton v. Baldwin*, 8 Humph. 209), Mississippi (*Armstrong v. Stovall*, 26 Miss. 275; *Davis v. Wilkerson*, 48 Id. 585), Rhode Island (*Metcalfe v.*

Coak, 2 R. I. 355) and North Carolina (*Harris v. Harris*, 7 Ired. Eq. 311; *Pippen v. Wesson*, 74 N. C. 442; *Atkinson v. Richardson*, 74 Id. 458), whilst all the other states adopt substantially the English doctrine: Kelly's Cont. M. W. 259, note 5, where all the cases are collated.

These were the two distinct doctrines when the married woman's statutes were enacted in the several states of the Union, and as first shown these rules have been used in the construction of these statutes. JOHN F. KELLY,

Bellaire, Ohio.

Supreme Court of Minnesota.

GOODNOW ET AL. v. EMPIRE LUMBER CO. ET AL.

A minor who executes a conveyance of real estate must disaffirm it within a reasonable time after he comes of age, or be barred of his right to do so.

When there is mere delay to disaffirm after coming of age, and there is nothing to explain or excuse it or show its necessity, whether the delay is for more than a reasonable time is a question for the court. A delay of three years and a half unexplained is unreasonable.

APPEAL from an order of the District Court of Winona county.

W. H. Yale and *J. M. Gilman*, for respondents.

Thomas Wilson, for appellants.

GILFILLAN, C. J.—November 27th 1857, Elizabeth M. Hamilton, then a married woman and owner of certain real estate in the city of Winona, conveyed the same, her husband joining in the deed, to the defendant Huff, under whom the other defendant claims. Mrs. Hamilton was born April 21st 1842. She died December 16th 1867, and her husband died November 10th 1874. Plaintiffs are their children, Mary, born March 31st 1859, and Eugenia, January 29th 1863. They bring the action to avoid the conveyance, because of the minority of Elizabeth M. Hamilton when she executed it. Plaintiffs gave notice to the lumber com-